Supreme Court, U. S.
FILED
DEC 17 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

Misc. No. 75-850

JACK EDWARD FLEMING and LAWRENCE CHARLES HINTON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Reasons for Granting the Writ	4
1. The decision of the Court of Appeals substantially broadens the scope of 18 U.S.C. § 242 in allowing prosecution where police officers strike a suspect without an allegation that the striking was "unlawful"	4
2. The decision of the Court of Appeals allows prosecution under 18 U.S.C. § 242 without specifying whether the Gravamen of the offense is summary punishment (unlawful beating) or an unlawful arrest and detention	5
Conclusion	6
Appendix	A-1

Cases Cited

Ex Parte Bain, 121 U.S. 1, 9-10 (1889)	5
Stirone v. United States, 361 U.S. 212 (1860)	5

Statutes Cited

Rule 7(c) F.R.Cr.P.	2
Title 28, United States Code § 1254(1)	2
18 U.S.C. 242	2, 3, 4, 5

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Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on November 17, 1975.

OPINION BELOW

The opinion of the Court of Appeals is, as yet, unpublished, but is appended hereto as Exhibit A.

JURISDICTION

The judgment of the Court of Appeals was entered on November 17, 1975, jurisdiction of this court is invoked under Title 28, United States Code § 1254 (1).

QUESTION PRESENTED

1. Does an indictment charging that Police Officers "did willfully strike, beat and assault" an individual and did thereby deprive him of "the right secured and protected by the Constitution and laws of the United States not to be deprived of liberty without due process of law" correctly charge on offense under 18 U.S.C. 242?

STATUTE INVOLVED

18 U.S.C. 242 provides, in pertinent part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, . . ." shall be fined not more than $1,000 or imprisoned not more than one year, or both; . . .

Rule 7(c) F.R.Cr.P. provides in pertinent part:

> (c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

STATEMENT

Petitioners are Police Officers of the City of St. Louis and were charged under 18 U.S.C. 242 by an indictment alleging as follows:

> On or about July 2, 1974, in St. Louis, Missouri, in the Eastern District of Missouri, Jack Edward Fleming and Lawrence Charles Hinton, who were then officers of the St. Louis, Missouri Police Department, while acting under color of the laws of the State of Missouri, did willfully strike, beat and assault Robert Steven Rueter, an inhabitant of the State of Missouri, and did, thereby, willfully deprive Robert Steven Rueter of the right secured and protected by the Constitution and laws of the United States not to be deprived of liberty without due process of law. In violation of Section 242, Title 18, United States Code.

Petitioners moved to dismiss the indictment upon the grounds that it did not state on offense and was too vague to adequately advise petitioners of the charge against them. The district court sustained the motion and ordered the indictment dismissed.

Rather than seek another more specific indictment, the Government appealed the District Court's order and the Court of Appeals for the Eighth Circuit reversed and remanded. From the decision of the Court of Appeals Petitioners seek review by this Court.

REASONS FOR GRANTING THE WRIT

1. **The Decision of the Court of Appeals Substantially Broadens the Scope of 18 U.S.C. § 242 in Allowing Prosecution Where Police Officers Strike a Suspect Without an Allegation That the Striking Was "Unlawful".**

Although the instant indictment charges that Petitioners did willfully strike, beat and assault Robert Steven Rueter, nowhere does the indictment state that such acts were in any manner *unlawful*, nor does the indictment make it clear exactly how such acts deprived Rueter of his "liberty".

The indictment specifically notes that defendants were police officers at the time of the incident and were acting "under color of law". It is submitted that it may very well be possible (and necessary) for an officer to "strike, beat and assault" a suspected criminal while attempting to effect an arrest or prevent an escape. In such event, the actions of the officer would be lawful, and no deprivation of any Constitutional right would result. Consequently, the failure of the indictment to state that the striking, beating and assaulting was unlawful constitutes a fatal defect.

If police officers must fear criminal prosecution each time they are required, in the course of their duties to strike a suspect, their efforts to enforce the law will be severely curtailed. Certainly if criminal prosecutions are to be considered, the Government should, at a minimum, be required to allege and prove that the officer's conduct exceeded the permissible bounds and was therefore *"unlawful"*.

2. **The Decision of the Court of Appeals Allows Prosecution Under 18 U.S.C. § 242 Without Specifying Whether the Gravamen of the Offense Is Summary Punishment (Unlawful Beating) or an Unlawful Arrest and Detention.**

It is impossible to determine from the indictment whether the gravamen of the offense charged is summary punishment (unlawful beating) or an unlawful arrest and detention. The indictment states that Rueter was deprived of *"liberty"* without due process of law.

Not only are the petitioners unable to prepare for the defense of one or the other of such offenses, it is entirely unclear which offense the Grand Jurors were considering when they indicted the defendants. Consequently, a Bill of Particulars as suggested by Court of Appeals, may well tell the petitioners what the prosecutor believes the indictment to charge, but cannot resolve the uncertainty of what was actually determined by the Grand Jury.

Once an indictment is returned, it can never be amended other than by another Grand Jury *Ex Parte Bain*, 121 U.S. 1, 9-10 (1889); *Stirone v. United States*, 361 U.S. 212 (1860); *Russell* case, *supra*, this Court observed, at 369 U.S. 770:

> "To allow the prosecutor, or the Court, to make a subsequent guess as to what was in the minds of the Grand Jury at the time they returned the indictment would deprive the Defendant of a basic protection which the guaranty of the intervention of a Grand Jury was designed to secure. For a defendant could then become convicted on the basis of facts not found by and perhaps not even presented to, the Grand Jury which indicted him."

In its present posture, the Indictment is so nebulous as to make it impossible to determine exactly what the Grand Jury charged.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals.

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APPENDIX

United States Court of Appeals
for the Eighth Circuit

No. 75-1655

United States of America, Appellant, v. Jack Edward Fleming and Lawrence Charles Hinton, Appellees.	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 3, 1975.

Filed: November 17, 1975

Before Heaney, Bright, and Ross, Circuit Judges

Per Curiam

The United States appeals from the dismissal of an indictment against two St. Louis, Missouri, policemen. We find the indictment to have been improvidently dismissed and order it reinstated.

On May 15, 1975, a federal Grand Jury returned an indictment against two St. Louis policemen, charging as follows:

> On or about July 2, 1974, in St. Louis, Missouri, in the Eastern District of Missouri, Jack Edward Fleming and Lawrence Charles Hinton, who were then officers of the St. Louis, Missouri Police Department, while acting under color of the laws of the State of Missouri, did willfully strike, beat and assault Robert Steven Rueter, an inhabi-

tant of the State of Missouri, and did, thereby, willfully deprive Robert Steven Rueter of the right secured and protected by the Constitution and laws of the United States not to be deprived of liberty without due process of law.

In violation of Section 242, of Title 18, United States Code.

The district court, in an unpublished memorandum opinion of July 22, 1975, dismissed the indictment for vagueness under Rule 7 of the Federal Rules of Criminal Procedure. The district court stated, in part, that

> [w]hile the essential elements of the crime appear to be present in the indictment, the language of the indictment appears to the Court to be so conclusory that it would be difficult for the defendants to prepare an adequate defense.

Rule 7(c) of the Federal Rules of Criminal Procedure requires only a "plain, concise and definite written statement of the essential facts constituting the offense charged." In interpreting this rule, the Supreme Court has recently held that

> an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. [*Hamling v. United States*, 418 U.S. 87, 117, 1974).]

See United States v. Sperling, 506 F.2d 1323, 1344 (2d Cir. 1974); *cert. denied*, 420 U.S. 962 (1975); *United States v. Skelley*, 501 F.2d 447, 452 (7th Cir.), *cert. denied*, 419 U.S. 1051 (1974); *United States v. Denmon*, 483 L.2d 1093, 1095 (8th Cir. 1973).

Under Rule 7(c) and *Hamling*, the indictment in the instant case is plainly sufficient. The indictment sets forth the four

elements necessary for a violation of § 242 (color of law, willfullness, inhabitancy of the victims, and deprivation of a right secured or protected by the Constitution or laws of the United States); specifies the federal right allegedly violated ("Not to be deprived of liberty without due process of law"); notes the statute the defendants are charged with violating; identifies the defendants by name and office; identifies the victim; describes the specific acts constituting the offense ("did willfully strike, beat and assault"); and alleges the date and place of those acts.

This indictment is materially identical to the indictments in *United States v. Stokes*, 506 F.2d 771 (5th Cir. 1975), and *United States v. Georvassilis*, 498 F.2d 883 (6th Cir. 1974), in which courts affirmed convictions under § 242. If the defendants in this case desire more specific information than that provided in the indictment. they may move for a bill of particulars. *See United States v. Debrow*, 346 U.S. 374, 378 (1953); *Tasby v. United States*, 504 F.2d 332, 335 (8th Cir. 1974); *cert. denied*, 419 U.S. 1125 (1975).

We reverse and remand for further proceedings consistent with this opinion.

A true copy.

Attest

Clerk, U.S. Court of Appeals, Eighth Circuit